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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ARISTA NETWORKS, INC.,

Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

Case No. 5:16-CV-00923-BLF

**ARISTA NETWORKS, INC.’S
OPPOSITION TO CISCO SYSTEMS,
INC.’S MOTION *IN LIMINE* NO. 4 TO
EXCLUDE PURPORTEDLY
IRRELEVANT, INFLAMMATORY
DOCUMENTS**

Date: June 14, 2018

Time 1:30 P.M.

Judge: Hon. Beth Labson Freeman

Dept: Courtroom 3

DEMAND FOR JURY TRIAL

The documents Cisco's MIL No. 4 (ECF 300, "MIL") seeks to exclude are directly relevant to Arista's claims, and none of Cisco's arguments regarding prejudice justify exclusion because Cisco has failed to identify any *unfair* prejudice—let alone unfair prejudice sufficient to outweigh the documents' high probative value—because the statements Cisco complains of are, in fact, true. Contrary to Cisco's assertions at deposition (and its expected theme at trial) that Arista was just another of many Cisco competitors with whom Cisco competes equally vigorously, Cisco did go to extreme efforts to try to compete with Arista in 2013 and 2014 (including attempting to disrupt Arista's IPO and creating anti-Arista "Tiger" teams that Cisco motivated using images of Arista's CEO on a [REDACTED]). When those generally pro-competitive efforts failed to slow Arista's erosion of Cisco's dominant market share, Cisco did in fact turn to an anticompetitive course of conduct including its CLI policy reversal and closure, copyright lawsuit, and the litigation FUD-based sales tactic described in the Competitive Playbook. Cisco's contentions to the contrary in its MIL are belied by the evidence and do not justify exclusion.

I. CISCO'S COMPETITIVE PLAYBOOK IS DIRECTLY RELEVANT TO ARISTA'S CLAIMS, IS NOT UNFAIRLY PREJUDICIAL, AND IS NOT MERELY A DRAFT PREPARED BY A ROGUE INDEPENDENT CONTRACTOR AS CISCO SUGGESTS

Cisco's Competitive Playbook for how to "Beat Arista" (Ex. 19, ECF 301-24 at 1-22 footer) is direct and highly probative evidence of Cisco's adoption of precisely the strategy alleged by Arista. After outlining four tactics for competing against Arista using traditional means, the Playbook describes a fifth tactic—" [REDACTED] " recommending that Cisco's salespeople " [REDACTED] " [REDACTED] " Ex. 19 at 2, 22. This is probative of at least the fact that Cisco committed the litigation FUD campaign Arista alleges, that Cisco intended to commit those acts, and that Cisco intended that its FUD campaign have the effect of helping Cisco win customers over Arista (relevant to intent, harm to competition, and damages to Arista). Cisco's MIL asserts this Playbook would be prejudicial because it might lead the jury to conclude "that Cisco engaged in the accused conduct." MIL at 4. However, Cisco's alleged "prejudice" is far from unfair (as required by FRE 403) and certainly does not outweigh the high probative value for the simple reason that *Cisco did in fact engage in the described " [REDACTED] " litigation FUD-based sales tactic* and did distribute

1 this Competitive Playbook—including the “[REDACTED]” section—for use in selling against Arista.

2 There is extensive evidence of Cisco’s use of this “[REDACTED]” sales tactic, including among
 3 the highest levels of Cisco’s leadership team. *See, e.g., Exs. P-R* (Chandler Dep. Exs. 186-188) and *Ex.*
 4 *S* (CSI-CPT-70033409) ([REDACTED]); ECF
 5 [REDACTED]; 210-21 (Scott Morton Rpt.), ¶ 148 ([REDACTED]). The evidence also contradict’s Cisco’s
 6 contention that this Playbook was a draft created by a rogue independent contractor. MIL at 3-5. [REDACTED]
 7 [REDACTED] after Cisco suggests John Hastwell created the purportedly rogue “draft” [REDACTED]
 8 [REDACTED], Soni Jiandani—the head of Cisco’s Insieme datacenter switch business unit—[REDACTED]
 9 Yousuf Khan (Cisco’s Vice President for Technical Marketing in the data center switches business unit)
 10 [REDACTED]
 11 [REDACTED] precisely the same version of the
 12 Competitive Playbook (complete with the “[REDACTED]” tactic) that Cisco’s MIL falsely asserts
 13 was an undistributed draft. *Ex. T* (CSI-CPT-00805192, [REDACTED]); *Ex. U* (CSI-CPT-
 14 00805194, the attached Competitive Playbook, identical to *Ex. 19* that Cisco asks to exclude).

17 Rajeev Bhardwaj, Cisco’s Vice President for Product Management in the datacenter business
 18 unit, [REDACTED]

19 [REDACTED]
 20 [REDACTED] *Ex. T* (CSI-CPT-00805192) at 2. [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED] *Id.* at 2. [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] *Id.* at 1. [REDACTED]
 28

1 [REDACTED]
 2 1 [REDACTED] U [REDACTED] V [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED] AA-BB [REDACTED]
 6 [REDACTED] Mr. Khan, Ms. Jiandani, or Cisco's 30(b)(6) corporate designee(s) can lay the
 7 foundation for admission of the Playbook, including as a party admission and as a business record.

8 Indeed, Cisco produced from its files no fewer than [REDACTED] copies of this Playbook with the "[REDACTED]
 9 [REDACTED]" tactic, belying Cisco's "draft" contention. *See Ex. CC* (Summary of metadata for copies of
 10 the Playbook and associated parent emails). Cisco also produced [REDACTED]
 11 [REDACTED]

12 [REDACTED] *See Ex. DD* (Summary of metadata for [REDACTED] copies and associated parent
 13 emails). [REDACTED]
 14 [REDACTED]

15 [REDACTED] *See Ex. EE* (Excerpts from Cisco's Nov. 22, 2017 Privilege Log).

16 Cisco's contentions in its MIL that Mr. Hastwell was an independent contractor and the asserted
 17 "subsequent draft" status of Cisco's **Ex. 23** version of the Playbook (*see* MIL at 4) are similarly belied
 18 by the evidence (and are irrelevant in view of the clear, authorized use of the "[REDACTED]" version
 19 of the Playbook by [REDACTED]). For example, Mr. Hastwell [REDACTED]
 20 [REDACTED].

21 **Ex. FF** (CSI-CPT-00836710) at 1. As to Cisco's asserted "subsequent
 22 draft," that version still includes the "[REDACTED]" sales tactic, albeit in red strikethrough text. **Ex.**
 23 **23**. The metadata produced by Cisco with that document states that it was collected from [REDACTED]
 24 [REDACTED]

25 [REDACTED]. Cisco offers no evidence that **Ex. 23** was available
 26 during, *e.g.*, 2015 (when Mr. Khan and Mr. Malik were using and circulating the version without any
 27 [REDACTED])

28 [REDACTED] *See Exs. W-X* (CSI-CPT-00825974 and CSI-CPT-00825975) and *Exs. Y-Z* (CSI-CPT-00804800 and CSI-CPT-00804801).

1 strikethrough) and no evidence that the strikethrough was not added, *e.g.*, following Cisco's loss of the
 2 copyright trial as a means of notifying the sales force that the litigation FUD-based strategy was no
 3 longer applicable.

4 Cisco's arguments regarding the purported "draft" nature of the Playbook and its authorship by
 5 an independent contractor—raised for the first time in Cisco's MIL and the Boulton declaration (**Ex.**
 6 **36**)—are also contrary to Cisco's 30(b)(6) designee's testimony on the relevant topic. Cisco designated
 7 Cesar Obediente to testify regarding Topic 68: "Any strategy or plan developed by you to compete
 8 against Arista . . . including . . . any competitive initiatives involving Arista." ECF 290-11 (Arista's
 9 30(b)(6) Notice) at 15, **Ex. GG** (Obediente 30(B)(6) Dep. Tr.) at 6:16-7:16. Mr. Obediente did little to
 10 prepare, testifying that as Cisco's designee regarding Cisco's efforts to compete with Arista, he was only
 11 prepared to testify as to [REDACTED]. *Id.* at 7:20-9:9, 13:18-
 12 23, 197:15-199:9. He was unable to provide any testimony about whether or not [REDACTED]
 13 [REDACTED]
 14 [REDACTED]. *Id.* at 343:4-345:20, 348:10-18. Tellingly, Mr.
 15 Obediente did not speak at all with Mr. Boulton—then still a Cisco employee and the Director of
 16 Competitive Intelligence—as part of his preparation, nor did Cisco designate Mr. Boulton for any topics.
 17 Arista sought a more prepared witness, but Cisco opposed and the Magistrate held that "the Court deems
 18 Mr. Obediente's testimony as testimony on behalf of Cisco, and grants no further relief as to these
 19 topics." ECF 174 (Dispute Letter) at 2, 4; ECF 177 (Order) at 3. As Magistrate Van Keulen held, Cisco
 20 should now be limited to the testimony it provided. Mr. Boulton's declaration, and related arguments by
 21 Cisco that are inconsistent with the limited testimony Cisco's 30(b)(6) designee provided, should be
 22 excluded. "Unless it can prove that the information was not known or was inaccessible, a corporation
 23 cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6)
 24 deposition." *Super Future Equities, Inc. v. WellsFargo Bank Minn.*, No. 3:06-cv-0271, 2007 U.S. Dist.
 25 LEXIS 91947, at *27-28 (N.D. Tex. Dec. 14, 2007).²

26 ² See also *Strategic Decisions, LLC v. Martin Luther King, Jr. Ctr. For Nonviolent Soc. Change, Inc.*,
 27 No. 1:13-cv-2510, 2015 U.S. Dist. LEXIS 58814, at *26 (N.D. Ga. May 5, 2015) (granting MIL
 28 precluding evidence that "contradicts, alters, supplements, amends or explains" an unprepared 30(b)(6)
 witness's testimony); *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (failing
 to provide a knowledgeable 30(b)(6) designee is "for all practical purposes, no appearance at all.")

II. THE “STOP ARISTA’S IPO” AND PRESENTATION INCLUDING THE [REDACTED] IMAGE ARE ALSO RELEVANT AND NOT UNFAIRLY PREJUDICIAL

Evidence that Cisco worked to prevent Arista’s IPO and Cisco’s anti-Arista competitive team presentations including the image of Arista’s CEO Jayshree Ullal’s [REDACTED] are directly relevant to show Cisco’s extreme efforts in 2013 and 2014 to slow Arista’s erosion of Cisco’s dominant market share. The failure of those efforts to slow Arista’s growth (and Cisco’s losses) set the stage for Cisco’s decision to implement the asserted anticompetitive course of conduct. *See, e.g.*, ECF 210-21 (Scott Morton Rpt.), ¶¶ 108-123 and **Ex. O** (Scott Morton Dep. Tr.) at 112:11-115:21 (discussing Cisco’s 2013-2014 failed efforts to compete). This evidence, and the Competitive Playbook, are also directly relevant to rebut Cisco’s contention that it viewed Arista just like any other Cisco competitor.³ *See, e.g.*, **Ex. HH** (D’Agostino Dep. Tr.) at 91:1-9; **Ex. II** (Palumbo Dep. Tr.) at 43:10-44:4.

Exhibit 16 to Cisco’s MIL makes clear that Cisco did, in fact, try to thwart Arista’s IPO—with Ms. Jiandani stating in April 2013 that “Every week counts here since we want to thwart Arista from filing an IPO.” **Ex. 16** at 1. Cisco may dispute that fact at trial, but that does not render it unfairly prejudicial nor would the parties presenting two competing interpretations of the evidence rise to the level of a “mini-trial” to be excluded under Rule 403. *Cf. In re CRT Antitrust Litig.*, 2016 U.S. Dist. LEXIS 166398, at *210-14 (N.D. Cal. Nov. 15, 2016) (relied on by Cisco, excluding evidence of two foreign regulatory bodies’ findings of antitrust violations by the defendants). Mr. Obediente similarly confirmed the truth and relevance of **Ex. 18** (the [REDACTED] document), confirming [REDACTED]

[REDACTED] *See Ex. GG* (Obediente 30(b)(6) Dep. Tr.) at 221:16-236:5; **Ex. 18** at 3. Moreover, Cisco raised no objection to the admission of this presentation (and the [REDACTED] image) in the copyright trial and it was admitted as Exhibit 6082. **Ex. JJ** (Copyright Trial Exhibit 6082); **Ex. B** (Copyright Trial Tr., 12/07/2017) at 2289:16-2293:1.

III. CONCLUSION

For the above reasons, Cisco’s Motion *In Limine* No. 4 should be denied.

³ This evidence is also relevant to witness credibility should Cisco offer testimony at trial, as it has in deposition and suggests it will in its MIL, that it viewed Arista as the same as any other competitor, did not try to stop Arista’s IPO, or did not use Cisco’s litigation against Arista as a sales tactic.

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Respectfully submitted,

/s/ Matthew D. Powers

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